UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. EPCRA-09-94-0015
CATALINA YACHTS, INC.,	COMPLAINANT'S RESPONSE TO RESPONDENT'S OPENING BRIEF
Respondent.	

COMES NOW THE COMPLAINANT in the above-entitled matter, the United States Environmental Protection Agency, by its counsel of record, David M. Jones, in response to the Respondent's Opening Brief filed in the above-entitled matter.

I. Statement of the Case

Complainant adopts the statement of the case as set forth in the Introduction to the Post Hearing Brief dated April 14, 1997, filed by Complainant in the above-entitled matter beginning on page 1 and ending on the top of page 4 thereof.

In the Preliminary Statement, Part I of Respondent's Opening Brief, Respondent proclaims that "[l]iability is admitted."[1] The word "liability" is generally understood to mean "responsible" or "answerable."[2] The statement is apparently a reaffirmation of the Order Granting Motion for Accelerated Decision As To Liability dated January 10, 1995. Respondent's words must mean that Respondent is acknowledging responsibility for, or that Respondent is answerable for, the violations of Section 313 of EPCRA[3] [42 U.S.C. § 11023] as charged in each of

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[1] Respondent's Opening Brief, Part I. Preliminary Statement, p.1.

[2] Webster's II New Reverside University Dictionary,p.689.

[3] In the first sentence of the Preliminary Statement on page 1 of Respondent's Opening Brief, Respondent uses an acronymn, EPRCA. At the top of page 2 of the Opening Brief, Respondent cites *In re: Apex Microtechnology, Inc.*(1993), Docket No. EPCRA-09-92-0007, for the proposition that to the extent Section 325(b)(2) of EPCRA serves as the criteria for assessing a civil penalty under Section 304 of EPCRA, Section 325(b)(2) is applicable in the same manner for violations of Section 313 of EPCRA. See *Apex* pp.11 and 12.

At the hearing Respondent referred to Section 325(b)(1)(C) of EPCRA as providing the statutory criteria for penalty assessment. See Transcript at 12 to 16, and Respondent's Exhibit R-1. The discussion in *Apex* makes it clear that Section 325(b)(1)(C) is not the applicable criteria for assessing penalties prescribed by Section 325(c) as claimed by Respondent. See also *In re: Pease And Curren, Inc.*(1991), Docket No. EPCRA-I-90-1008,pp.10-12.

Complainant disclaims any responsibility for determining the

the seven counts in the Complaint.

At the end of the Preliminary Statement Respondent proclaims that "[u]nder the statutory criteria for the assessment of . . . penalties, no civil penalty is warranted," and "the imposition of a civil penalty would be unjust, and thus undermine the very law EPA Region IX seeks here to enforce and uphold." Then, at the end of the Opening Brief, Respondent states "to penalize Catalina Yachts would not further compliance with the law. It would be unjust and would only promote the notion that our government is neither caring nor thoughtful."[4] However, Respondent provides no reason as to why the assessment of a civil penalty against Respondent would be unjust. That no bases for these statements is found in the Brief, compels the conclusion that the statements are made by Respondent solely for the purpose of arousing the sympathy of the Trier of Fact.

The statutory authority for the assessment of penalties for

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meaning of the acronym, EPRCA, used by Respondent in the Opening Brief. Further, Complainant disclaims responsibility for determing the applicability of Section 325(b)(1)(C) as the criteria for determing the civil penalty in the instant action. On the basis of the disclaimers set forth above, Complainant urges the Trier of Fact to strike all references in Respondent's Opening Brief to the acronymn EPRCA and to Section 325(b)(1)(C) wherever cited as the statutory criteria for penalty assessment.

[4] *Id.*p.17.

a violation of Section 313 of EPCRA is found at Section 325(c)(1) of EPCRA which reads in pertinent part:

> (1) Any person . . . who violates any requirement of section . . . 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

Complainant contends that the language in Section 325(c)(1) of EPCRA, a strict liability statute, is to be given a common sense interpretation and that the words enacted by the Congress mean just what they say. Accordingly, if by their statement in the Opening Brief "[l]iability is admitted" Respondent is admitting liability for failure to File Form Rs, as charged in the Complaint, then, Section 325(c)(1) above, makes appropriate the assessment of a civil penalty. Respondent's arguments in the Opening Brief set forth above, that no penalty is to be assessed against Respondent for failure to file the Form Rs, is contrary to the obvious meaning of the words from Section 325(c)(1) above.

II. Respondent's Arguments Favoring No Penalty.

a. Respondent didn't know EPCRA existed.

At the end of the direct testimony of Respondent's sole witness at hearing, Gerald Bart Dougles, Vice President and chief of engineering at Catalina Yachts,[5] the witness was asked to

[5] Transcript at 79, lines 11 to 14.

"simply explain to the Court[Sic] why Catalina Yachts did not file Form Rs for the years in question with regard to its Woodland Hills' facility."[6] The response which followed was "[m]ainly because I didn't know about it."

b. Respondent complied with California and local requirements.

Mr. Douglas testified that prior to the inspection by EPA in November of 1993, he knew of only two agencies that required reports regarding chemicals on the Respondent's premises, the Hazardous Materials Division of the County of Los Angeles and South Coast Air Management District.[7] Examples of the reports submitted to these agencies were made a part of the record and designated Respondent's Exhibits 3, 4 and 5, respectively.

Mr. Douglas testified that it was his assumption that EPA charged Southwest Air Quality Management District with the enforcement of EPA regulations. This was to suggest without saying that Mr. Douglas believed that when he complied with the Southwest Air Quality Management District's directives he was satisfying the mandate charged to EPA by the Congress of the

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[6] Transcript at 119, line 25; and Transcript 120 lines 1 to 7.

[7] Transcript at 82, lines 3 to 13.

United States including EPCRA.[8]

In summary, Respondent believes that no penalty should be assessed against Respondent in this administrative action because their submission of reports to the Hazardous Materials Division of the County of Los Angeles and the South Coast Air Quality Management District, represented by Respondent's Exhibits R-3, 4 and 5, respectively, satisfied Respondent's obligation to submit the Form Rs as required by Section 313 of EPCRA.

c. Application of ERP/statute adjustment factors eliminates civil penalty.

Respondent has given consideration to a selection of factors taken from the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-To-Know Act (1986) and Section 6607 of the The Pollution Prevention Act (1990) (hereinafter ("ERP") and purportedly from EPCRA that result in the conclusion that no penalty should be assessed. With respect to the attitude factor from the ERP, Respondent would grant themselves a 30% reduction of the unadjusted proposed civil penalty set forth in the Complaint of $175,000 even though it was stated throughout the hearing that the proposed civil penalty

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[8] Transcript at 87, lines 7 to 11.

would be $162,500 after considering the adjustment for the delisting of acetone.

In their Opening Brief, Respondent lumps together four factors identified as statutory guidelines,[9] nature, circumstances, extent and gravity of the violation and take another 30% reduction in the proposed civil penalty prior to adjustment for the delisting of acetone.[10]

History of prior violations is a factor that is discussed in Section 16 (a)(2)(B) of the Toxic Substances Control Act(TSCA), as amended and the ERP. Respondent takes another write-down of 15% for the history of prior violations factor.[11] At this point Respondent has reduced the unadjusted proposed penalty by 75%.[12]

d. Equity provides a credit which eliminates penalty assessment.

Through the testimony of their sole witness at hearing, Respondent presented extensive testimony regarding the various

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[9] Opening Brief,p.14.

[10] Opening Brief,p.15.

[11] Opening Brief,p.15.

[12]

Attitude	30%
Statutory Guidelines	30%
Prior History of Violations	15%
	75%

projects undertaken by Respondent purportedly in the interest of the environment. In their Opening Brief Respondent presents figures which purportedly represent the costs voluntarily incurred as environmentally beneficial expenditures both in the past and for the future.[13]

The only clue to the manner in which Respondent would apply the costs of their environmentally beneficial expenditures is found in the heading on page 16 of the Opening Brief as "Such Other Matters as Justice Requires," but, generally expressed as "such other matters as justice may require."

Undaunted by reality, Respondent would apply the justice factor to reduce the civil penalty to be assessed to zero. The credit to the unadjusted proposed civil penalty of $175,000, that Respondent claims is in excess of $400,000, as shown in Part VI, the conclusion to their Opening Brief. Respondent has provided no detail in support of their justice claim.

III. Complainant's Arguments Favoring Penalty Assessment.

a. Everyone is deemed to know the law.

Respondent's argument that the penalty should be reduced because Respondent was not aware of EPCRA and that Respondent's

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[13] Opening Brief,p.16.

violation of EPCRA was unintentional is without merit because Respondent is charged with knowledge of the law and should have been aware of the requirements of EPCRA.

It is well settled law that all persons are charged with knowledge of United States codes as well as regulations and rules promulgated thereunder and published in the Federal Register. 44 U.S.C. § 1507; *Federal Crop Ins. v. Merrill*, (1947), 332 U.S. 380, 384-385; *T.H. Agriculture and Nutrition Co.* (1984), TSCA VII-83-T-191, p.11; *Colonial Processing, Inc.* (1991), Docket No. II EPCRA-89-0114, pp. 20-21; *Riverside Furniture*, p.5.

Further, the fact that Respondent was unaware of EPCRA does not provide a basis to reduce a penalty. Apex Microtechnology (1993), Docket No. EPCRA-09-92-00-07, p.18. EPCRA was enacted into law in 1986, almost seven years before the inspection which led to the filing of the Complaint.[14] Since that time EPA has conducted workshops as EPCRA outreach. Since enactment of EPCRA the Agency has conducted a minimum of two compliance assistance workshops in California each year. At least one of these workshops was held in Southern California. Notice of the workshops were mailed out to companies like Respondent who had

[14] Exhibit A,p.3 ¶7, and Exhibit 2.

more than 100 employees by EPA every year beginning in 1987 and continuing at least through 1995. The database maintained by EPA shows that Respondent was on the mailing list for these mailings at least in 1987 and 1993.

Based upon the outreach programs by EPA, Respondent should have known the reporting requirements of EPCRA. *Riverside Furniture*, p.7. (The success of outreach programs is predicated on what the respondent should have known as a result of outreach efforts.) "The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law." *Riverside Furniture, p.7,n.2.*

In addition, public policy requires that a penalty not be reduced on the basis of a respondent claiming to be ignorant of the law. Such reductions would encourage ignorance of the law and should be avoided. This is especially true with regard to Respondent whose place of business is located in a suburban Los Angeles community.[15] Los Angeles County is a major metropolitan area providing immediate communications with the world on every level.

Since enactment of EPCRA, EPA has conducted numerous EPCRA

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[15] Transcript at 79, lines 1 to 10.

Workshops in the Los Angeles and Burbank areas. Either location is close to the Woodland Hills facility. Respondent apparently ignored the Workshop announcement on a consistent basis. Therefore, no penalty reduction should be made on the basis of Respondent's lack of knowledge of EPCRA.

b. Compliance with other environmental laws does not support a reduction in penalty.

Respondent has argued that the penalty should be reduced in this matter based on Respondent filing reports with local agencies on the use of resins containing styrene, the use of acetone and air emissions resulting from such use.[16] In support of these claims Respondent has submitted to Complainant and entered as an exhibit on the record of this proceeding a document marked as Exhibit R-3 which was submitted to the Los Angeles City Fire Department by a letter dated February 20, 1989, signed Brian Parker, Catalina Yachts.[17] In addition, two other documents submitted to South Coast Air Quality Management District covering Respondent's emissions data for the years 1988 and 1989 were

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[16] See Respondent's Exhibits R-3, 4 and 5.

[17] Transcript at 19, lines 24 and 25, Transcript at 20, lines 1 to 3, Transcript at 21, lines 20 to 25, Transcript at 22, lines 1 to 15.

entered on the record as Exhibit R-4 and R-5. According to Respondent the forms submitted to the Fire Department and the Air Quality Management District provided similar information as that required on Form Rs under EPCRA.

Section 313 of EPCRA requires the submission of data that is chemical specific. The information submitted on the Form Rs is not only chemical specific but, includes releases to air (fugitive and stack), water and land, and treatment on site and transfers off site.[18]

The testimony of Complainant's witness, Dr. Pam Tsai, shows that with respect to Exhibit R-3, releases to air, water or land are not shown. In addition, R-3, unlike Form R, does not provide information as to waste management practices at Respondent's Woodland Hills facility or information with respect to off-site treatment, recycling or disposal of the chemicals.[19]

As for Exhibit R-4, the information reported in this exhibit is limited to releases to the air. In addition, the information given is limited to organic gases. The Exhibit R-4 form contains no information which will inform the public as to the releases of

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[18] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

[19] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

styrene.[20]

The information submitted by Respondent on Exhibit R-5 does not provide the same information as the Form R. The information provided is not compiled in a national database made available to the public. The form contains information regarding styrene emissions, but is silent as to acetone emissions.[21]

The information submitted by Respondent in lieu of the Form Rs does not contain the comprehensive information that is to be reported under Section 313 of EPCRA. Compliance with other environmental laws such as the laws of the State of California or local agencies, does not relieve Respondent of its obligation to comply with EPCRA, nor does it provide a basis for reduction or mitigation of the penalty. *In re: Apex Microtechnology, Inc.* (1993), Docket No. EPCRA-09-92-00-07, pp. 5-6; *In re: Pacific Refining Co.* (1994), EPCRA Appeal No. 94-1, pp. 18-19 and n.19.

In *Apex*, respondent submitted reports to an air district providing information regarding annual usage of the same chemicals that it was required to report on under EPCRA. *Apex*, p.5. *Apex* argued, as Respondent here, that although it did not

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[20] Transcript at 49, lines 23 to 25, at 50, lines 1 to 4.

[21] Transcript at 50, lines 5 to 17.

file its Form Rs, it did in fact disclose the equivalent information. *Apex*, p.6. The tribunal deciding that action rejected the argument and held that "there is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities." *Apex*, p.14. see also *Pacific Refining Co*, p.19 and n.19.

Further, Section 313 of EPCRA requires that Respondent provide the information to EPA and to the State of California, not just to local agencies. see e.g. *Pacific Refining Co.*,pp. 18-19. Congress recognized that EPCRA would collect information that might have already been reported under other environmental laws, but passed EPCRA so that the information would be comprehensive and easy to access by the general public. In the debate on the bill that became EPCRA, Senator Lautenberg stated: "The information maybe scattered in air files, water files, and on RCRA manifest forms, for example, but not pulled together in one place to provide a complete usable picture of total environmental exposure." 131 Cong.Rec. S11776 (daily ed. Sept. 19, 1985) (statement of Sen. Lautenberg).

Thus, no reduction in the penalty should be made by the Trier of Fact based upon the fact that Respondent filed other reports with local agencies.

c. Application of the ERP/statutory adjustment factors do not preclude the assessment of a civil penalty.

1. Factors Related to the Violation.

The applicable statutory factors are found in Section 16 of the Toxic Substances Control Act (TSCA), as amended[22] [15 U.S.C. § 2615] which draws a distinct demarcation between factors relating to the violation itself and factors relating to the violator. For the violation itself, Section 16 of TSCA provides that in determining the amount of the civil penalty EPA must take into account the "nature, circumstances, extent and gravity of the violation or violations." [15 U.S.C. § 2615(a)(2)(B)]. The meaning of each of these terms will be explored in turn.

The commonly understood meaning of "nature" is the most appropriate interpretation. Webster's New World Dictionary defines nature as "[t]he essential character of a thing; quality or qualities that make something what it is; essence . . ." . As EPA noted in its 1980 TSCA penalty policy, "the nature (essential

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[22] With respect to civil penalties under EPCRA, Section 325(b)(2) of EPCRA [42 U.S.C. § 11045(b)(2)] provides in part:

> Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15.

character) of a violation is best defined by the set of requirements violated." 45 Fed.Reg. 59770, 59771.

In this case, the nature of the EPCRA violations was the Respondent's failure to provide timely, complete and accurate information to EPA and the State of California as required by Section 313 of EPCRA [42 U.S.C. § 11023].[23] Except for 1992, Respondent filed each of the Form Rs required by the statute over one year after the date that the same were due and after the November, 1993, inspection during which the Respondent's non-compliant status was uncovered.[24] The Form Rs for 1992 were filed eleven months after the date the same were due. Respondent's failure to provide the Form R information in a timely manner deprived the public of information on the use and releases of chemicals in the community and, consequently, deprives both individuals and government organizations of the opportunity to take steps to reduce the risks posed by these releases and thereby, could result in increased risk to the local community.

"Circumstances" is reasonably interpreted in the context of

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[23] Transcript at 13, lines 8 to 25.

[24] Exhibit A 7 ¶15.

the TSCA penalty assessment factors as reflecting the probability of harm occurring as a result of the violation. See 45 Fed. Reg. 59770, 59772. Under Section 313 of EPCRA the circumstances of the violation "takes into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to the State of California and to the Federal government." ERP, p.8. The circumstances of the violations in this case is the failure to report in a timely manner.[25] This is the most significant of the violations of Section 313. Failure to report is classified as the most serious violation of Section 313 of EPCRA because such failure deprives the public of information on chemical releases which may have a significant affect on public health and the environment. In the case at bar toxic release information for the year 1988, Counts I and III, was not made available to the public for approximately five years.

The natural meaning of the term "extent" suggests a consideration of the degree, range or scope of a violation. In the context of Section 313 of EPCRA, EPA interprets this "extent" to take into consideration the quantity of a listed toxic chemical a facility processes, manufactures or otherwise uses.

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[25] Transcript at 16, lines 1 to 9.

Facilities that process, manufacture or otherwise use ten or more times the reporting threshold for the Section 313 chemicals create a greater potential of exposure to the employees at the facility, the public and the environment. The amount of toxic chemicals processed, manufactured or otherwise used should be considered in assessing a penalty under EPCRA because the major goal and intent of EPCRA is to make available to the general public, on an annual basis, a reasonable estimate of the toxic chemicals emitted into their local communities from regulated sources.[26] ERP, p.9.

Another factor in determining the extent of the violation is size of the respondent's business. The size of the respondent's business reflects the proposition that a smaller penalty will have the same deterrent effect on a small company, as a large penalty on a larger company. Respondent has more than 50 employees and at the time the Complaint was filed had annual sales of approximately $40 million.

The common sense meaning of "gravity" in the context of penalty assessment is the overall seriousness of a violation. In both TSCA and the ERP, EPA interprets "gravity" as a composite of

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[26] Transcript at 30, lines 13 to 22.

other factors. For violations of Section 313 of EPCRA it is reasonable to view gravity as incorporating the considerations under the extent and circumstances elements of the violations.[27]

In their Opening Brief, Respondent's consideration of these factors is found on pages 14 amd 15. Respondent's consideration of these factors does not distinguish factors pertaining to the violation from factors pertaining to the violator. In fact, Respondent's discussion under a heading listing these factors doesn't relate the factors to any element of the case. Nevertheless, Respondent concludes at the end of a discussion that the Presiding Administrative Law Judge can only determine to be irrelevant, that Respondent is entitled to a diminution in the civil penalty by thirty percent. For the reasons stated above, Complainant contends that the factors related to the violation were considered and applied properly in determining the unadjusted civil penalty.

2. Statutory Adjustment Factors That Relate To The Violator.

Section 16 of TSCA also requires the consideration of factors pertaining to the violator. These factors include: "Ability to pay, effect on ability to continue to do business,

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[27] Transcript at 31, lines 12 to 17.

any history of prior such violations, the degree of culpability, and such other factors as justice may require." [15 U.S.C. § 2615(a)(2)(B)]

Ability to pay generally encompasses a review of a violator's solvency and an assessment of the effect a given penalty will have on the firm's ability to continue in business. However, in an order by the Presiding Administrative Law Judge[28] rescinding an order whereby Complainant sought financial information to determine Respondent's ability to pay, Respondent stated that it was not raising ability to pay as a defense to the proposed penalty.[29] The order then stated ". . . the only reasonable interpretation of Catalina's assertion is that it is a waiver of 'ability to pay/inability to pay' as a defense to the penalty sought by Complainant . . ." .[30] No evidence has been presented to date by Respondent regarding Respondent's ability to pay the proposed civil penalty or that payment of the proposed civil penalty would in any way impair Respondent's ability to continue in the boat building business.

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[28] Order Rescinding Discovery Order dated April 1, 1996.

[29] *Id.*p.4.

[30] *Id.*

While Respondent does not have any history of prior violations of EPCRA, on page 15 of the Opening Brief, Respondent seeks a reduction in the proposed civil penalty of fifteen percent. Downward adjustments under this factor are not permitted. See, *In re: Spang & Company*(1995), EPCRA Appeal Nos. 94-3 & 94-4,p.27,n28; See also, Pacific Refining Company (1994), EPCRA Appeal No. 94-1,p.11; In re: Apex Microtechnology, Inc (1993), Docket No. EPCRA-09-92-0007,p.16; In re: K-I Chemical U.S.A., Inc.(1995), Docket No. TSCA-09-92-0018,p.24.

EPCRA has been determined to be a strict liability statute; thus, culpability is considered only when there is evidence that Respondent knowingly violated EPCRA. *Riverside Furniture*, Interlocutory Order Granting Complainant's Motion For Partial Accelerated Decision, p.5,n.2. (Intent is not an element of an EPCRA civil violations); see also ERP, p.14 ("Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA . . . ."). There is no evidence that Respondent's violations were knowing or willful. Although EPA considered the statutory factors of Respondent's ability to pay, effect on ability to continue to do business and culpability, in the case at bar, no adjustment was made by Complainant in the proposed civil penalty based upon these

factors because they were determined by EPA to be inapplicable to Respondent.

On page 15 of their Opening Brief, Respondent has comments under the heading Economic Benefit Resulting From the Violation. Economic Benefit to Respondent is not a statutory factor. However, continuing the comment made by Respondent regarding David B. Wright, who was hired by Respondent to prepare the late Form Rs, who had a good working rapport with Respondent's witness, who was employed by the consulting firm named Encom as shown by the letter accompanying Respondent's Exhibit R-5, but was never called upon to advise Respondent's witness, an officer of the Respondent corporation, on Respondent's obligations under EPCRA and other Federal environmental laws.[31]

The final factor in the category of statutory factors to be considered is "other factors as justice may require." On page 16 of the Opening Brief, Respondent's brief comments covering this factor are found under a heading which reads "Such Other Matters as Justice Requires."

It is the general practice at EPA to apply this factor

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[31] Transcript at 98, lines 15 to 25.

during settlement negotiations.[32] To assure national consistency the ERP has provided guidance in assessing issues which may qualify as "other factors as justice may require." The ERP factors include: new ownership for history of prior violations, borderline violations and lack of control over the violation. In the case at bar Respondent's violations are not due to a new ownership for history of prior violations. Nor are the violations borderline since Respondent used acetone and styrene at quantities well over ten times the reporting quantity threshold[33] and had over 200 employees at the time of the inspection,[34] versus 10 employees for the number of employees

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[32] Transcript at 34, lines 14 to 20, and Transcript at 37, lines 5 to 18.

[33] The following is a summary of usage and threshold taken from the Complaint:

		Acetone Usage	Styrene Usage
1988	approx.	308,106 pounds	1,784,078 pounds*
1989	approx.	101,655 pounds	2,691,348 pounds**
1990	approx.		898,416 pounds**
1991	approx.		624,441 pounds**
1992	approx.		660,798 pounds**
Threshold		10,000 pounds	* 50,000 pounds*
			** 25,000 pounds**

[34] Transcript at 81, line 7.

reporting threshold.[35] Nothing on the record in this action shows that Respondent had less than total control over the violations. The ERP warns that "[u]se of this reduction is expected to be rare and the circumstances justifying its use must be thoroughly documented in the case file."[36]

At hearing Respondent presented extensive evidence of projects undertaken by Respondent which were represented as environmentally beneficial expenditures. The relationship of these projects to the violations charged against Respondent in the Complaint was not made clear at the hearing. Complainant was left to surmise the application of Respondent's testimonial evidence.

Complainant contends that the evidence of past projects by Respondent presented at hearing fail to meet the evidentiary requirements discussed in *In re: Spang & Company* and for that reason may not be considered under the justice factor in determing the amount of the civil penalty to be assessed. Respondent has compounded the evidentiary failure in their Opening Brief by presenting proposed adjustments as percentages

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[35] Section 313(a) [42 U.S.C. § 11023(a)].

[36] ERP,p.18.

and dollars without explanation as to how the percentages or dollars were determined. For example: On page 16 of the Opening Brief Respondent has set forth dollar amounts which are to be used in adjusting the civil penalty. No clue is given as to how Respondent arrived at these amounts. For the reasons stated above, Complainant contends that the factors related to the violator were considered and applied properly in determining the unadjusted civil penalty.

3. EPA Also Considered The Adjustment Factors In The ERP.

In addition to the statutory factors, in assessing a penalty EPA also considers it appropriate to weigh several additional adjustment factors under the ERP. These are: voluntary disclosure, delisted chemicals, attitude and supplemental environmental projects. ERP, p.8.

The first adjustment factor, voluntary disclosure is not applicable to the case at bar because the violations were discovered as a result of an inspection.[37] ERP, p.14.

The supplemental environmental project adjustment is limited in its application by Complainant to settlement

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[37] Transcript at 58, lines 3 to 11.

discussions.[38]

The adjustment factor for delisted chemicals is applicable in this case. Acetone was delisted effective June 16, 1995, and the fixed reduction percentage in the proposed civil penalty taken from page 17 of the ERP, 25% is applicable[39] even though Respondent has used the unadjusted proposed civil penalty shown in the Complaint in their Opening Brief. Complainant urges the Trier of Fact to determine that the adjusted proposed civil penalty in this action is $162,500.

A supplemental environmental projects ("SEP") was never accomplished by the parties because an SEP was never presented to Complainant by Respondent for consideration and evaluation.

In their consideration of the adjustment for attitude beginning on page 13 of the Respondent's Opening Brief, Respondent would credit themselves with $175,000 or 30%. The attitude adjustment factor with its two components, cooperation and compliance, was not applied in calculating the unadjusted proposed civil penalty set forth in the Complaint because of

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[38] Transcript at 37, line 25, and Transcript at 38, lines 1 to 25, and Transcript at 54, lines 11 to 20.

[39] Transcript at 54, lines 2 to 10, and Transcript at 73, lines 1 to 6.

Complainant's practice of considering application of the factor during the course of settlement discussions. Complainant believes that the speed and completeness with which Respondent comes into compliance as well as the degree of cooperation and preparedness, including but not limited to, allowing access to records, responsiveness and expeditioous provision of suporting documentation requested by Complainant is best measured through the settlement process.

Respondent's generosity in awarding itself a $175,000 credit overlooks Respondent's tardiness in supplying the EPCRA Inspector information regarding Respondent's useage and release of chemicals. The inspection at the Woodland Hills facility took place in November, 1993, however, the information requested by the inspector was not supplied by Mr. Wright, the person hired by Mr. Douglas to complete the Form Rs the day of the inspection[40], until May, 1994.[41] On the basis of Respondent's conduct in connection with the inspection and achieving compliance with EPCRA, Complainant urges the Trier of Fact to deny Respondent any credit under this factor. For the reasons stated above,

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[40] Transcript at 91, lines 3 to 21.

[41] Exhibit 2 to Exhibit A.

Complainant contends that the adjustment factors in the ERP were considered and applied properly in determining the unadjusted proposed civil penalty.

d. EPA Has Met The Burden That The Proposed Penalty Is Appropriate.

Section 22.24 of the Rules of Practice, 40 C.F.R. Part 22, places the burden of proof regarding the "appropriatness" of the penalty on Complainant. Judge Reich writing for the Environmental Appeals Board in *In re: Employers Insurance of Wausau and Group Eight Technology, Inc.* said:

> The complainant's burden under TSCA § 16 and 40 C.F.R. § 22.24 is only to demonstrate that it 'took into account' certain criteria specified in the statute, and that its proposed penalty is 'appropriate' in light of those criteria and the facts of the particular violations at issue. To satisfy the complainant's initial burden of going forward, it should ordinarily suffice for the complainant to prove the facts constituting the violations, to establish that each factor enumerated in TSCA § 16[42] was actually considered in formulating the proposed penalty, and to explain and document with sufficient evidence or argument how the penalty proposal follows from an application of the section 16 criteria to those particular violations.

In re: Employers Insurance of Wausau And Group Eight Technology, Inc.(1997), TSCA Appeal No. 95-6, p.33.

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[42] The penalty criteria set forth in Section 16(a)(2)(B) of TSCA applied in *Employers* is applicable to the instant action by virtue of Section 325(b)(2) of EPCRA which provides for Class II administrative penalties, and requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15.

Complainant's initial burden, to prove the facts constituting the violations was met upon the issuance of the Order Granting Motion for Accelerated Decision dated January 10, 1995, signed by the Presiding Administrative Law Judge. The argument set forth in this Part III of Complainant's Response to Opening Brief clearly establishes that each factor enumerated in TSCA § 16(a)(2)(B) was actually considered in formulating the penalty proposed in the Complaint and how the proposed civil penalty as adjusted for the delisting of acetone follows from an application of the criteria set forth in Section 16(a)(2)(B) of TSCA to the violations charged in the Complaint. There is adequate evidence on the record of this proceeding to show that Complainant has satisfied and sustained the initial burden of going forward imposed under Section 22.24 of the Consolidated Rules of Practice.

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IV. Conclusion.

Based on the foregoing, it is respectfully requested that an Initial Decision issue in favor of Complainant and that a penalty of ONE HUNDRED SIXTY-TWO THOUSAND FIVE HUNDRED DOLLARS be assessed against the Respondent.

Dated: April 30, 1997.

Respectfully submitted,

_____

Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Complainant's Response To Respondent's Opening Brief was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, Room 3706 (1900)
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire
Eileen M. Nottoli, Esquire
BEVERIDGE & DIAMOND
One Sansome Street, Suite 3400
San Francisco, California 94105

Date

Office of Regional Counsel
U. S. Environmental Protection
Agency, Region 9

(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	
Catalina Yachts, Inc.	EPCRA Appeal Nos. 98-2 & 98-5
Docket No. EPCRA-09-94-0015	

[Decided March 24, 1999]

FINAL DECISION

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

CATALINA YACHTS, INC.

EPCRA Appeal Nos. 98-2 & 98-5

FINAL DECISION

Decided March 24, 1999

Syllabus

The United States Environmental Protection Agency Region IX ("the Region") and Catalina Yachts, Inc. ("Catalina") both appeal the civil penalty assessed by Administrative Law Judge Spencer T. Nissen ("the Presiding Officer") in his Initial Decision dated February 2, 1998, for Catalina's violations of section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11023. The Presiding Officer found that Catalina had committed seven violations of EPCRA § 313 reporting requirements for acetone used and styrene processed between 1988 and 1992 and, after an evidentiary hearing, imposed a civil penalty in the amount of $39,792. The Presiding Officer's penalty was substantially lower than the $175,000 penalty sought by the Region. The assessed penalty reflects the Presiding Officer's decision to award Catalina reductions to the gravity-based penalty for the "attitude" and "other matters as justice may require" penalty adjustment factors provided under the Agency's EPCRA section 313 penalty policy.

On appeal, Catalina contends that the Presiding Officer's penalty calculation was error because he: 1) rigidly adhered to the Agency's penalty policy; 2) did not take full account of the statutory penalty factors; and 3) inappropriately limited credit for environmentally beneficial projects. Catalina proposes that a nominal or zero penalty is appropriate.

In its appeal, the Region argues that the Presiding Officer's penalty calculation was error because: 1) there was inadequate factual support for making downward adjustments for the "cooperation" and "compliance" components of the "attitude" factor; and 2) the penalty adjustments for environmentally beneficial projects are not factually supported in the record and are inconsistent with this Board's standard for applying the "other matters as justice may require" factor as articulated in *In re Spang & Co.*, 6 E.A.D. 226, 250-52 (EAB 1995). The Region proposes a penalty of $160,774.

Held: The Presiding Officer's Initial Decision is reversed in part, and Catalina is ordered to pay a penalty in the amount of $108,792.

There is no merit to Catalina's contentions that the Presiding Officer rigidly adhered to the section 313 penalty policy or did not consider statutory penalty factors. The Initial Decision contains ample analysis to support the Presiding Officer's gravity-based penalty determination grounded in the penalty policy matrix. Furthermore, the record clearly demonstrates that the Presiding Officer considered statutory penalty factors in making adjustments not specifically contemplated by the penalty policy.

As to some of the specific alleged deficiencies in the penalty analysis cited by Catalina, the fact that Catalina supplied information to state and local agencies regarding toxic chemicals not reported to the Region does not alter the extent of the violation for purposes of the gravity-based penalty assessment under EPCRA § 313. Catalina's proposal to apply Small Business Administration standards to determine appropriate "extent" levels for a gravity-based penalty calculation was not raised before the Presiding Officer and will not be considered by the Board on appeal. Finally, the Presiding Officer's decision not to adjust the penalty downward for Catalina's "lack of culpability" is not error where the penalty policy contemplates that baseline penalty assessments are based on an assumption that a respondent may not have had actual knowledge of the requirements of section 313 of EPCRA and actual knowledge under the policy can serve as a basis for increasing the baseline penalty.

The Presiding Officer did not commit error in applying the "attitude" factor. The evidence in the record, including the testimony of Regional officials, establishes a basis for reducing the penalty in light of Catalina's cooperation. In addition, Catalina's testimony regarding the complexity of its efforts to complete the Form Rs and the conditions associated with a major earthquake that disrupted Catalina's operations adequately supports the Presiding Officer's conclusion that a reduction for "compliance" was warranted.

The Presiding Officer committed error in applying the "such other matters as justice may require" penalty adjustment factor ("justice factor"). The justice factor comes into play only where the other adjustment factors have not resulted in a fair and just penalty. More particularly, a reduction for environmentally beneficial expenditures should be considered only when "the circumstances are such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice." *Spang,* 6 E.A.D. at 250. If, and only if, despite application of the other adjustment factors, an assessed penalty is so disproportionate to the violations at issue as to be manifestly unjust should a presiding officer apply the justice factor to recognize environmentally beneficial projects. Here, where Catalina is getting the full benefit of a 30% overall downward adjustment for "attitude," as well as a 25% downward adjustment to the two acetone violations for the delisting of acetone, the resulting penalty of $108,792 for Catalina's seven violations of section 313 reporting requirements is "fair and just." Therefore, no reduction under the justice factor is warranted.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

The United States Environmental Protection Agency Region IX ("the Region") and Catalina Yachts, Inc. ("Catalina") both appeal the Initial Decision of Administrative Law Judge Spencer T. Nissen ("the Presiding Officer") dated February 2, 1998, assessing a civil penalty against Catalina for violations of section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11023.[23] The Presiding Officer found that Catalina had committed seven violations of section 313 reporting requirements[24] and, after an evidentiary hearing, imposed a civil penalty in the amount of $39,792. Initial Decision at 28, 40.

For the reasons discussed below, we conclude that the Presiding Officer's penalty was error, reverse the Initial Decision in part, and order Catalina to pay a penalty of $108,792.

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[23]The Region filed a notice of appeal with the Board on March 26, 1998, which was assigned EPCRA Appeal No. 98-2 ("App. No. 98-2"). Catalina's notice of appeal was filed on the same date and assigned EPCRA Appeal No. 98-5 ("App. No. 98-5"). We cite to the parties' briefs filed with the Board by reference to their assigned appeal numbers (*e.g.*, "App. Brief 98-2" (the Region's appeal brief); "Rep. Brief 98-2" (the Region's reply brief); "App. Brief 98-5" (Catalina's appeal brief); "Rep. Brief 98-5" (Catalina's reply brief)).

[24]The Presiding Officer found Catalina liable upon consideration of the Region's Motion for Accelerated Decision on January 10, 1995. *See In re Catalina Yachts, Inc.*, Dkt. No. EPCRA-09-94-0015 (ALJ, Jan. 10, 1995). Catalina's liability is not at issue before the Board.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

EPCRA § 313 requires certain facilities[25] to submit annually, no later than July 1 of each year, a Toxic Chemical Release Inventory Form ("Form R") for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established chemical thresholds. *See In re Spang & Co.*, 6 E.A.D. 226, 228 (EAB 1995), citing *In re K.O. Mfg., Inc.*, 5 E.A.D. 798, 799-800 (EAB 1995). The first reporting year was 1987, and Form Rs for 1987 were due by July 1, 1988. EPCRA § 313(a), 42 U.S.C. § 11023(a); 40 C.F.R. § 372.30(d). Form Rs include information on the maximum amount of the toxic chemical present at the facility during the calendar year, the methods for disposing of the toxic chemical, and the annual quantity of toxic chemical disposed of by each method. EPCRA § 313(g), 42 U.S.C. § 11023(g). The statute authorizes penalties of up to $25,000 for each violation of section 313. EPCRA § 325(c)(1), 42 U.S.C. § 11045(c).[26]

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[25]The reporting requirements apply to "owners and operators of facilities that have 10 or more full-time employees and that are in Standard Industrial Classification Codes 20 through 39 (as in effect on July 1, 1985) and that manufactured, processed or otherwise used a toxic chemical listed under subsection (c) of this section in excess of the quantity of that toxic chemical established under subsection (f) of this section during the calendar year for which a release form is required under this section." EPCRA § 313(b)(1)(A), 42 U.S.C. § 11023(b)(1)(A); *see also* 40 C.F.R. § 372.22.

[26]The Debt Collection Improvement Act of 1996 directs the Agency to make periodic adjustments of maximum civil penalties to take into account inflation. *See* 31 U.S.C. § 3701. Inflation adjusted penalty amounts have been published at 40 C.F.R. § 19.1 *et seq.*, and apply to violations occurring after January 30, 1997.

B. *Factual and Procedural Background*

Catalina is a California corporation that manufactures recreational sail boats ranging from eight-foot dinghies to 30-foot cruising boats.[27] Catalina's manufacturing facility is located in Woodland Hills, California. Catalina's facility has 10 or more full-time employees and is classified under Standard Industrial Classification Code 3732 - Boat and Boat Building.

In November 1993, the Region sent Mr. William Deviny, a Toxic Release Inventory Specialist, to inspect the Catalina facility and other facilities in the area. *See* Inspection Report at 1 (May 26, 1994). Mr. Deviny met with Mr. Gerald B. Douglas, Vice President and Chief Engineer for Catalina, and informed him of Catalina's potential responsibilities under section 313 of EPCRA. *Id.* Mr. Douglas was unfamiliar with the Form R reporting requirements. *Id.* Subsequent to the November 1993 inspection, Mr. Douglas immediately retained Mr. David Wright, an environmental consultant, to assist in the filing of Catalina's Form Rs. Hearing Transcript ("Tr.") at 91. This required identification of all chemicals on-site and evaluating whether they exceeded threshold levels for 1988 to 1992. *Id.* Approximately two months later, on January 17, 1994, an earthquake, centered in Northridge, California, caused a fire at the Catalina facility. *Id.* at 93. The fire shut down the facility for four months. *Id.* The earthquake also caused Catalina's files to be dumped "all over the floor" and delayed Catalina's completion of the Form Rs.[28] *Id.* at 94. Approximately six months after Mr. Deviny's inspection, in May 1994, Catalina filed its Form Rs for 1988 through 1992 with the Region. Initial Decision at 22.

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[27]Statements of fact herein are based on the record before the Board. We note that Catalina's Web site at http://www.catalinayachts.com lists sailboats ranging from 22 to 50 feet in length.

[28]We note that while production at Catalina's plant was suspended for four months, the Region has asserted (and Catalina has not disputed) that the business office was closed for only "a few days of the period." App. Brief 98-2 at 21 n.15.

Catalina used 38,168 pounds of acetone during the 1988 calendar year, 101,665 pounds during the 1989 calendar year, 1,089 pounds in 1990, 321 pounds in 1991, and 1,802 pounds in 1992. Acetone was listed as a toxic chemical reportable under EPCRA § 313 in 40 C.F.R. § 372.65 during this period, but was subsequently proposed for delisting, 59 Fed. Reg. 49,888 (Sept. 30, 1994), and delisted effective June 16, 1995, 60 Fed. Reg. 31,643 (June 16, 1995). Catalina also processed 1,784,078 pounds of styrene in the 1988 calendar year, 2,691,348 pounds in 1989, 898,416 pounds in 1990, 624,441 in 1991, and 660,778 pounds in 1992. Styrene is listed as a toxic chemical reportable under EPCRA § 313. *See* 40 C.F.R. § 372.65.

On June 20, 1994, the Region filed a complaint against Catalina for seven alleged failures to timely file Form Rs, including calendar years 1988 and 1989 for acetone, and calendar years 1988 through 1992 for styrene. The Region sought civil penalties totaling $175,000, the maximum $25,000 penalty authorized by statute for each violation without any downward adjustments. The Region moved for an accelerated decision with regard to liability, which the Presiding Officer granted on January 10, 1995. Following an evidentiary hearing as to the appropriate penalty, held on January 27, 1997, the Presiding Officer assessed a total penalty against Catalina of $39,792.

The Region, in calculating its recommended penalty, utilized an enforcement and penalty policy developed specifically to address violations of EPCRA § 313. *See* Enforcement Response Policy for Section 313 of the Emergency Planning and Community-Right-to-Know Act and Section 6607 of the Pollution Prevention Act ("ERP") (Aug. 10, 1992). The ERP states that its purpose is to:

> ensure that enforcement actions for violations of EPCRA § 313 * * * are arrived at in a fair, uniform and consistent manner; that the enforcement response is appropriate for the violation committed; and that persons will be deterred from committing EPCRA § 313 violations * * * .

ERP at 1.

The ERP sets forth a two-step process for calculating penalties. *Id.* at 7. First, a gravity-based penalty reflecting characteristics of the violation is determined utilizing a penalty matrix. *Id.* at 8. Second, the gravity-based penalty may be adjusted upward or downward taking into account factors reflecting characteristics of the violator. *Id.*

The ERP provides that adjustments to the gravity-based penalty may be based upon consideration of the following characteristics of the violator: (a) any voluntary disclosure of the violation by the violator; (b) the violator's history of prior violations; (c) whether the toxic chemical has been delisted subsequent to the violation; (d) the violator's attitude; (e) "other factors as justice may require"; and (f) ability to pay. ERP at 14-20.

The Presiding Officer applied both the ERP and the statutory factors set forth in section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615, in calculating the penalty imposed. *See* Initial Decision 28-40.[29] First, the Presiding Officer calculated a gravity-based penalty based on the matrix in the ERP. *Id.* at 29-30. The Region

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[29]EPCRA § 325(c), 42 U.S.C. § 11045(c), does not set forth factors to be considered in determining penalties for reporting violations under section 313. The Region argued that the statutory factors set forth in section 16 of TSCA, 15, U.S.C. § 2615 should be applied, citing EPCRA § 325(b)(2), 42 U.S.C. § 11045(b)(2), which provides: "Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15." While section 325(b)(2) does not explicitly reference violations under section 313 (as it does the emergency notification violations under section 304), the Presiding Officer found the Region's position to be "reasonable" and accepted it. Initial Decision at 29 n.11. We do not disturb the Presiding Officer's decision to apply the TSCA factors. *See In re Woodcrest Mfg., Inc.*, EPCRA Appeal No. 97-2, slip. op. at 21, n.11 (EAB, July 23, 1998), 7 E.A.D. ___ (a presiding officer "may exercise [discretion] by looking to the factors listed in such other sections as guidance in specific cases as suggested by the Region."). Furthermore, Catalina concedes that the appropriate statutory penalty factors are set forth in TSCA § 16, 15 U.S.C. § 2615. App. Brief 98-5 at 3.

had determined that all seven violations were extent level A, circumstance level 1, and Category I violations. The Presiding Officer's calculation of the gravity-based penalty differed from the Region's in only one respect. The Presiding Officer found that Count VII, involving Catalina's failure to file a Form R for styrene processed in 1992, should have been considered a Category II violation and that the penalty for that count should have been calculated on a per day basis.[30] Thus, the Presiding Officer found the total gravity-based penalty for the seven violations to be $173,274. *Id.*

The Presiding Officer then turned to the adjustment factors set forth in TSCA § 16, 15 U.S.C. § 2615, and those listed in the ERP. Initial Decision at 30-31. TSCA section 16 provides in pertinent part:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.[12]

TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). The Presiding Officer found that Catalina had waived "ability to pay" and "effect on ability to

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[30]Category II violations involve Form Rs submitted less than one year after the due date. ERP at 4. For Count VII, the Form R was due on July 1, 1993, but was submitted on May 20, 1994, only 324 days late. The formula for calculating this Category II, extent level 1 violation is:

((324 days late - 1)x($25,000))/365

Id. at 14. Hence, the gravity-based penalty for Count VII is $23,274. The Region does not dispute the Presiding Officer's penalty calculation for Count VII.

continue to do business" as bases for adjusting the penalty.[13] Initial Decision at 26-27, 31. Then, in accordance with the ERP, the Presiding Officer reduced the penalty for each of the acetone violations by 25% to reflect that acetone had been delisted. Initial Decision at 33. The penalty reduction for the acetone delisting is $12,500.[14]

The Presiding Officer also analyzed whether the gravity-based penalty should be reduced under the "attitude" adjustment factor set forth in the ERP. *Id.* at 33-35. The "attitude" factor consists of two components: "Cooperation" and "compliance," with a 15% reduction allowed for each, or a total maximum "attitude" reduction of 30%. ERP at 18. The Presiding Officer found that both components of the factor, "cooperation" and "compliance" were demonstrably satisfied by the record. The Presiding Officer found the testimony of Ms. Pam Tsai, the Region's sole witness, demonstrated Catalina's cooperation and applied the maximum 15% reduction for "cooperation" to the gravity-based penalty. Initial Decision at 33. Catalina was also granted the maximum 15% reduction for compliance based on its immediate retention of Mr. Wright, the complexity of the work involved in completing the Form Rs, and Catalina's "record of being a good corporate citizen as demonstrated by its having no prior violations." *Id.* at 34-35. Thus, the Presiding Officer reduced the gravity-based penalty by 30% for the "attitude" factor.

Finally, the Presiding Officer applied the adjustment factor of "such other matters as justice may require" specified by TSCA § 16(a)(2)(B), 42 U.S.C. § 2615(a)(2)(B), and the ERP. Citing the Board's decision in *In re Spang & Co.*, 6 E.A.D. 226 (EAB 1995), for the proposition that environmentally beneficial expenditures may be considered under the "justice" factor, the Presiding Officer reduced the

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[13]We do not review the Presiding Officer's determination with respect to Catalina's waiver of these issues because neither Catalina nor the Region raised them on appeal.

[14]The Region specifically agrees with the Presiding Officer's application of the 25% downward adjustment for each of the acetone violations. App. Brief 98-2 at 9-10.

gravity-based penalty by $69,000. Initial Decision at 36, 39. He awarded Catalina a downward adjustment for the following three environmentally beneficial initiatives: 1) substitution of DBE for acetone in Catalina's cleaning processes; 2) elimination of anti-fouling paints on boat bottoms; and 3) utilization of a brushable gel coat program, rather than using spray application. *Id.* at 36. The Presiding Officer found that the costs of effectuating these measures was $230,000 and calculated the reduction based on 30% of these costs. *Id.* at 39. Thus, Catalina's penalty was calculated as follows:

Gravity-based penalty	$173,274
Less: 30% attitude adjustment	$ 51,982
Acetone delisting	$ 12,500
Environmentally beneficial activities (30% of $230,000)	$ 69,000
Total Penalty	$ 39,792

Id.

The Region contends on appeal that the Presiding Officer's penalty calculation was error because: 1) there was inadequate factual support for making downward adjustments for the "attitude" factor; and 2) the penalty adjustments for environmentally beneficial projects are not factually supported in the record and are inconsistent with this Board's standard for applying the "other matters as justice may require" factor as articulated in *In re Spang & Co.*, 6 E.A.D. 226, 250-52 (EAB 1995). The Region proposes a penalty of $160,774.[15]

Catalina argues in its appeal that the Presiding Officer's penalty calculation was error because he: 1) rigidly adhered to the Agency's penalty policy; 2) did not take full account of the statutory penalty factors;

[15]The Region's proposed penalty is based on the Presiding Officer's gravity-based penalty amount ($173,274) reduced by $12,500 for the delisting adjustment factor of the ERP.

and 3) inappropriately limited credit for environmentally beneficial projects. Catalina proposes that a nominal or zero penalty is appropriate.

For the reasons provided below, we reverse in part, the Presiding Officer's penalty assessment. First, we reject Catalina's contention that the Presiding Officer committed reversible error by rigidly adhering to the ERP in this case. We then review, in turn, Catalina's arguments concerning the gravity-based penalty calculation, and both parties' issues with the Presiding Officer's application of the ERP and statutory penalty adjustment factors, and conclude that a penalty in the amount of $108,792 is warranted in this case. In particular, we reverse the Presiding Officer's penalty adjustment for the "other matters as justice may require" factor.

II. *DISCUSSION*

The Presiding Officer is afforded significant discretion under the regulations governing this matter "to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, [so long as he or she] set[s] forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). The Presiding Officer also "must consider" appropriate penalty guidelines, but is not bound by them. *Id.*; *see also In re Woodcrest Mfg., Inc.*, EPCRA Appeal No. 97-2, slip op. at 22 (EAB, July 23, 1998), 7 E.A.D. ___; *In re DIC Americas, Inc.*, 6 E.A.D. 174, 189 (EAB 1995). The duty to consider appropriate penalty guidelines "carries with it no obligation to adhere to the penalty policy in a particular instance. Nor does it suggest that a presiding officer errs in the slightest respect if he or she decides not to deviate from the penalty policy." *DIC Americas,* 6 E.A.D. at 190.

On many occasions, the Board has affirmed the proposition that penalty policies serve to facilitate the application of statutory penalty criteria, and that Presiding Officers and the Board may utilize applicable penalty policies in determining civil penalty amounts. *See Woodcrest Mfg.* slip. op. at 22; *DIC Americas*, 6 E.A.D. at 189 (citing *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994)); *In re Pacific Ref. Co.*, 5 E.A.D. 607, 613 (EAB 1994)(also citing *Great Lakes*).

This Board generally will not substitute its judgment for that of a Presiding Officer when the penalty assessed falls within the range of penalties provided in the penalty guidelines, absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty. *See Pacific Ref.*, 5 E.A.D. at 613 (EPCRA § 313 penalty policy); *see also In re Employers Ins. of Wausau*, 6 E.A.D. 735, 757 (EAB 1997) (reviewing application of Polychlorinated Biphenyls ("PCB") penalty policy); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120 (EAB 1994) (involving PCB penalty policy).

A. *Strict Adherence to the ERP*

As a preliminary matter, we review Catalina's argument that the Presiding Officer inappropriately adhered strictly to the ERP in determining an appropriate penalty. *See* App. Brief 98-5 at 2 (citing *Pacific Ref.*, 5 E.A.D. at 613). Catalina's argument appears to be based in the principle that an agency cannot, consistent with the Administrative Procedure Act, 5 U.S.C. § 551, utilize a policy as if it were a "rule" issued in accordance with rulemaking procedures.

We agree that the Agency's presiding officers must refrain from treating policies, including the ERP, as rules, and "must be prepared 'to re-examine the basic propositions' on which the Policy is based." *Wausau*, 6 E.A.D. at 761. However, the record before the Board simply does not support Catalina's contention of rigid adherence. Here, the Presiding Officer cannot properly be characterized as having inflexibly applied the ERP.[16] In fact, he made it clear in his Initial Decision that he was utilizing both the ERP and the statutory factors of TSCA § 16. *See* Initial Decision at 14 n.6, 30-31 (stating "The matters at issue thus turn on application of the adjustment factors * * * set forth in TSCA § 16."),

[16]We note that the Board has previously addressed and dismissed a similar contention in another EPCRA penalty case. *See Great Lakes*, 5 E.A.D. at 374 (holding no error in penalty analysis where presiding officer adequately considers the statutory penalty factors).

33, 35. For example, in discussing the culpability factor under the ERP, the Presiding Officer stated:

> The ERP states that the penalty matrix is intended to apply to "first offenders" and thus implies that the absence of prior EPCRA violations affords no basis for a downward adjustment in the penalty [ERP at 16, 17]. This policy is also unexceptionable and no issue can or should be taken therewith. It is concluded, however, that the penalty adjustment factors in TSCA § 16 may not be compartmentalized and that the absence of prior violations is a factor to be considered in determining whether a respondent is a good corporate citizen and thus entitled to favorable consideration as to other aspects of the penalty calculation.

Id. at 32-33. This analysis demonstrates that the Presiding Officer clearly was considering the statutory penalty factors in making adjustments not specifically contemplated by the ERP. Thus, we decline to disturb the Presiding Officer's determination on the ground that he rigidly applied the ERP in calculating the penalty in this matter.

B. *Application of the Statutory Penalty Factors*

We now turn to the parties' contention that the Presiding Officer failed to properly apply the statutory factors for calculating the appropriate penalty. We address each argument in turn.

1. *Gravity-based Penalty Calculation*

First, Catalina takes issue with the Presiding Officer's calculation of the gravity-based penalty of $173,274. Catalina contends that it was error for the Presiding Officer to conclude "without supporting analysis" that the ERP provided a rational basis for calculating this amount. App. Brief 98-5 at 3. We disagree.

The ERP "reasonably implements the statutory criteria, with a range of penalties to reflect differing circumstances." *See In re Genicom Corp.*, 4 E.A.D. 426, 431 (EAB 1992). The Presiding Officer's reference to the ERP penalty matrix and application of the matrix to each violation satisfies his duty of articulating the basis for the penalty. *See In re Sandoz, Inc.*, 2 E.A.D. 324, 328 n.11 (CJO 1987) (discussing presiding officer's duty to explain how the facts fit the policy). The Initial Decision in this case contains ample analysis to support the Presiding Officer's gravity-based penalty determination grounded in the ERP and statutory factors. The Presiding Officer reviewed and analyzed the pertinent facts for each alleged violation, and assigned the appropriate category, extent levels, and circumstance levels outlined in the ERP matrix.[17] *See* Initial Decision 29-30. Therefore, the Presiding Officer properly referred to the ERP and adequately explained how he arrived at the gravity-based penalty amount.

Catalina also argues that the Presiding Officer "did not take into account the fact that Catalina had submitted data on chemical use emissions to various local agencies" in assessing the "circumstances" factor for calculating a gravity-based penalty. App. Brief 98-5 at 4. Catalina points out that it "filed annually reports on its use of acetone and styrene with the local fire department and annually filed reports on its air emissions with the South Coast Air Quality Management District." *Id.* Catalina also asserts that consideration of its self-described "multiple and meaningful community outreach programs" should have been given weight with respect to this aspect of the Presiding Officer's gravity-based penalty calculation.

We have previously held that supplying information to state and local agencies regarding toxic chemicals not reported to EPA, "does not mitigate [a] failure to comply with § 313 with respect to Form Rs," and we see no reason to find otherwise here. *See In re Pacific Ref. Co.*, 5 E.A.D. 607, 622 n.19 (EAB 1995). The Presiding Officer noted that the

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[17]In fact, the Presiding Officer's review of the Region's use of the ERP uncovered an error with respect to Count VII. *See supra* note 8.

information Catalina filed with the South Coast Air Quality Management District and the local fire department was not available in the same form or manner as required by the Form R reports. He noted further that "preparation of Form Rs involved more than the simple transposing of information from reports to the SCAQMD." Initial Decision at 34. Likewise, to the extent that Catalina believes its public outreach activities constitute a consideration for calculating the gravity-based penalty, we find nothing in the statute or ERP that would compel a presiding officer to give such consideration in determining the gravity-based penalty. We decline to find his decision not to include this consideration to be clear error, particularly since Catalina's overall conduct and "lack of culpability" were subsequently used to mitigate the gravity-based penalty.

Catalina's appeal also appears to take issue with the amount of the Presiding Officer's penalty reduction to account for the acetone delisting. Catalina seeks an 80% reduction as part of the gravity-based penalty calculation for the acetone violations to obtain a $10,000 base penalty for the acetone violations.[18] Because we see no clear error by the Presiding Officer with respect to the delisting adjustment and can find no basis or precedent for Catalina's proposed 80% reduction, we affirm this aspect of the penalty calculation.

Next, Catalina relies on *In re Hall Signs*, Dkt. No. 5 EPCRA-026-96 (ALJ, Oct. 30, 1997), to question the Presiding Officer's application of the ERP guideline's "extent" factor in calculating the gravity-based penalty. As an alternative, Catalina proposes the application of the Small Business Administration standards to determine appropriate "extent" levels. App. Brief 98-5 at 5-6. Our review of the record indicates that Catalina did not raise these issues before the

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[18]The ERP provides for a fixed reduction of 25% for violations involving chemicals that have been delisted "before or during the pendency of the enforcement action." ERP at 18. The Presiding Officer applied the reduction to the gravity-based penalty for the two acetone violations for a reduction of $12,500 (25% of $50,000). Catalina suggests, without further explanation, that delisting should result in a base penalty for the two acetone violations that is 20% of $50,000, or $10,000. *See* App. Brief 98-5 at 6-7. In other words, Catalina seeks an 80% reduction for delisting.

Presiding Officer, and therefore we will not consider them in this appeal. *See Woodcrest Mfg., Inc.*, EPCRA Appeal No. 97-2, slip op. at 11 (EAB, July 23, 1998), 7 E.A.D. ___.

2. *Application of Adjustment Factors*

a. *History of Prior Violations*

Catalina argues that the Presiding Officer should have applied a 25% downward adjustment because it had no prior violations of EPCRA section 313. The Presiding Officer noted that the ERP's "penalty matrix is intended to apply to 'first [time] offenders'." Initial Decision at 32. The Presiding Officer properly declined to provide a reduction, since as the Region points out in its Reply, it would be "duplicative" to give Catalina credit as a "first time offender" when that is assumed by the penalty matrix. Rep. Brief 98-2 at 12. We believe that the Presiding Officer properly exercised his discretion in applying this adjustment factor and decline to reduce the penalty as Catalina suggests.

b. *Degree of Culpability*

Catalina also contends that the Presiding Officer should have reduced the penalty another 25% for its lack of "culpability." Catalina correctly characterizes the record as containing "no evidence that Catalina was aware of its obligation to file Form R reports." App. Brief 98-5 at 7. We do not disagree that in some situations, a person's lack of actual knowledge of a regulatory requirement might appropriately be considered in mitigation of a penalty. However, in this case, the ERP states:

> Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA and its requirements and because the statute only requires facilities to report information which is readily available.

ERP at 14. The ERP further ERP states that if a violation is knowing or

willful, the Agency may assess per day penalties, under section 325(c) of EPCRA, or take other enforcement action as appropriate. *Id.* Thus, penalty assessments under the ERP are based on an assumption that a respondent may not have had actual knowledge of the requirements of section 313 of EPCRA. Accordingly, the Presiding Officer's decision not to adjust the penalty downward for Catalina's lack of culpability was not error. Therefore, Catalina's request for a reduction on this basis is denied.[19]

c. *Attitude*

Both Catalina and the Region take issue with the Presiding Officer's application of the "attitude" factor of the ERP and TSCA section 16(a)(2)(B). Neither party disputes the Presiding Officer's authority to consider this factor in calculating the penalty; rather, they challenge how the factor was applied to the facts of this case. As previously noted, *supra* section I.B., the "attitude" factor is composed of both a "cooperation" and a "compliance" component, and an adjustment of up to 15% can be made for each component. *See also* ERP at 18. "Cooperation" is evaluated in light of the violator's behavior during the compliance evaluation and enforcement process, and includes:

> degree of cooperation and preparedness during the inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during or after the inspection, and cooperation and preparedness during the settlement process.

Id. Under the "compliance" component "the Agency may [adjust] the

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[19]While the Presiding Officer appropriately rejected a reduction based on lack of culpability, he explicitly noted that Catalina was "a good corporate citizen as demonstrated by its having no prior violations" and stated that this "tips the scale" in favor of receiving a reduction to the penalty for "compliance". Initial Decision at 35. Thus Catalina did benefit from its prior compliance history.

gravity-based penalty [downward] in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance." *Id.*

We have addressed the application of the "attitude" factor under the ERP in *In re Pacific Ref. Co.*, 5 E.A.D. 607, 616 (EAB 1994). There, we found that the Presiding Officer "cited numerous factors supporting his conclusion that 'Pacific at all times acted in a cooperative and compliant manner in its handling of this matter.'" *Id.* We were unwilling to disturb the Presiding Officer's findings and conclusions with respect to the "attitude" factor in the absence of the Region providing record cites or additional arguments to persuade us to give less weight to this adjustment factor.

Here, we are presented with several arguments by Catalina and the Region that warrant discussion. First, Catalina argues for an additional 25% downward "attitude" adjustment based on Catalina's "'knowledge of the requirement' or lack thereof." App. Brief 98-5 at 7. These facts were considered by the Presiding Officer in the context of the "prior history of violations" issue and we see no basis in the statute, the EPCRA regulations, or the ERP to further adjust the penalty in this case as proposed by Catalina.

The Region argues that the Presiding Officer's reduction of the penalty by 30% under the "attitude" factor was error because it is unsupported by the record. App. Brief 98-2 at 18-22. The Region points out that the Presiding Officer granted the maximum 15% reduction for "cooperation" based only on the fact that Catalina allowed the inspection and responded to information requests. *Id.* at 18. The Region also argues that the "cooperation" reduction is only appropriate in rare or unusual circumstances, except in the settlement context. *Id.* at 19.

We find the Region's arguments to be unpersuasive. First, there is no evidence in the record to indicate that Catalina was uncooperative at any stage of the enforcement process. What evidence that exists in the record is consistent with the Presiding Officer's finding that Catalina was

cooperative and entitled to a penalty reduction for "cooperation." In fact, the Region's own witness conceded that Catalina was cooperative.

> Q: * * * Have you investigated yourself in any way whether or not Catalina Yachts cooperated during the investigation?
> A: My understanding [sic] they were.

Tr. at 39.

Furthermore, testimonial evidence presented by Catalina's witness, Mr. Douglas, illuminates Catalina's cooperation at the time of the Region's on-site inspection, as well as during a follow-up phone call from the inspector, Mr. Deviny. Tr. at 90, 84-95.

Although the Region's witness testified that Catalina was cooperative, she did not consider adjusting the penalty for this component in setting the penalty in the complaint. *Id.* at 39. Her verified statement submitted at the hearing explained that it was the Region's policy to allow a reduction for "attitude" only in the context of settlement. *See Id.* Exhibit A, Declaration of Pi-Yun "Pam" Tsai, ¶ 12.; *see also* Initial Decision at 29. The Presiding Officer rejected the Region's position as arbitrary, and the Region has not raised this issue on appeal.[20]

We note that the "cooperation" component as defined in the ERP is concerned with a number of aspects of the enforcement process in

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[20]We reject the Region's argument that the Presiding Officer's decision on the "cooperation" component was improper in light of the Board's decision in *In re Harmon Electronics., Inc.*, RCRA Appeal No. 94-4, slip op. at 60 (EAB, Mar. 24, 1997), 7 E.A.D. ___ (holding that penalty adjustments under a new self-policing, self-reporting policy intended for use only in settlements should not be applied in fully contested and adjudicated cases). *See* App. Brief 98-2 at 18. *Harmon* is distinguishable from this case since the policy considered there was, by its terms, expressly limited to the settlement context. In contrast, the Region here concedes that "the Judge has discretion under Section 16(a)(2)(B) of TSCA to adjust a penalty on the bases cited by Judge Nissen." App. Brief 98-2 at 1-2.

addition to settlement. This includes the "degree of cooperation and preparedness during the inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during the inspection * * * ." ERP at 18. The Region does not argue, and the record does not support, any contention that Catalina did not cooperate in any of these respects. While the ERP's reference to "cooperation and preparedness during the settlement process" supports the proposition that a full 15% downward adjustment may be more appropriate in the settlement context than in a contested case, we view cooperation during settlement as just one of the aspects of a respondent's conduct that should be considered collectively in determining whether, and to what extent, a reduction for cooperation should be granted. While the Presiding Officer could well have granted less than a 15% reduction for "cooperation," we do not find his decision to give the full reduction clearly erroneous.

Next, we turn to the Region's contentions regarding the compliance component of the attitude factor. As noted, *supra*, the ERP provides that compliance includes "consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance." ERP at 18. Our review of the record and the Initial Decision indicates that the Presiding Officer's determination was amply supported by the record.

The Presiding Officer found that Catalina's immediate retention of Mr. David Wright to assist in the preparation and submission of the Form Rs demonstrated good faith efforts to come into compliance. The Presiding Officer also analyzed the speed of Catalina's compliance, and found that the six-month duration that passed before the Form Rs were filed with EPA demonstrated compliance in light of the fact that the Northridge earthquake caused a fire in the production plant shutting down operations for four months. The Presiding Officer also considered testimony regarding the complexity of identifying, collecting, analyzing and transposing the chemical use data from several years into the Form Rs from Catalina's records and reports filed with state and local agencies. Initial Decision at 34-35. While the Region points out that the record shows that Catalina's business offices were only closed for a few days due

to the earthquake, Catalina asserts that the earthquake disrupted its files. Rep. Brief 98-5 at 5. On balance, we are sympathetic to the unforeseen delays and unexpected disruption that an act of God, of the magnitude of the Northridge earthquake, can inflict on those with even the best of intentions. We find no abuse of discretion in the Presiding Officer's decision in this regard.[21] Accordingly, we do not disturb the Presiding Officer's compliance determination and application of a 15% reduction to the gravity-based penalty for this component of the "attitude" factor. Thus, we uphold the 30% downward adjustment to the gravity-based penalty for the "attitude" factor.

d. *Other Matters as Justice May Require*

Catalina and the Region also appeal the Presiding Officer's application of the "other matters as justice may require" penalty adjustment factor ("justice factor"). Both rely on our decision in *In re Spang & Co.*, 6 E.A.D. 226 (EAB 1995), where we held that a presiding officer could legitimately consider "environmentally beneficial projects" and expenses associated with their implementation under the justice factor.[22] *Id.* at 249. In *Spang*, we identified the conflicting policy objectives of the Agency that the case presented on the issue of whether to consider environmental good deeds under the justice factor; namely the desire to look favorably upon and encourage those good deeds, but also a

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[21]We note that there is nothing in the record indicating that the Region had conveyed any sense of urgency to Catalina for filing the late Form Rs, nor did the Region set or convey any earlier deadlines for Catalina's submission of the Form Rs. Had there been evidence of such admonitions, it might have weighed against finding Catalina's satisfaction of the compliance component.

[22]Catalina erroneously asserts in its brief that, based on our holding in *Spang*, the Board would have "allowed a penalty reduction of 71%" for this factor. App. Brief at 8. While the presiding officer in *Spang* did reduce the penalty by 71% using the justice factor, we remanded his decision to "determine whether Spang has made a valid claim for having the $173,700 gravity-based penalty lowered based upon [the justice factor], and if so, how much of a downward adjustment is required to achieve justice." *Spang & Co.* at 252. We find Catalina's analysis unpersuasive and thus deny the requested 70% reduction.

need to uphold the deterrent effect of the Agency's enforcement efforts. We stated:

> to strike the proper balance between these conflicting forces, we are of the view that the evidence of environmental good deeds *must be clear and unequivocal*, and the circumstances *must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.*

Spang, 6 E.A.D. at 250 (emphasis added). In addition we expressed the opinion that "no project, however close the nexus [between the project and the violation at issue], should be credited unless the penalty which would otherwise be assessed would work an injustice." *Id.* at 250-51. In light of our pronouncements in *Spang*, we do not believe a reduction for the justice factor is appropriate in this case.

As we stated in *Spang*, the justice factor "vests the Agency with broad discretion to reduce the penalty *when the other adjustment factors prove insufficient or inappropriate to achieve justice.*" *Id.* at 249 (emphasis in original). We also stated that "use of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just." *Id.* at 250-51. Thus, it is clear that the justice factor comes into play only where application of the other adjustment factors has not resulted in a "fair and just" penalty. If, and only if, despite application of the other adjustment factors, an assessed penalty is so disproportionate to the violations at issue as to be manifestly unjust, should a presiding officer apply the justice factor to recognize environmentally beneficial projects.

Here, we are affirming the Presiding Officer's decision to grant Catalina the full benefit of the "cooperation component" of the "attitude" factor over the objection of the Region. We also are affirming the decision to give Catalina the full benefit of the "compliance" component reduction, again over the Region's objection, and which even the Presiding Officer viewed as "more problematic." *See* Initial Decision at 33. Having given Catalina the full benefit of the "attitude" adjustment factor, as well as a

25% downward adjustment for the delisting of acetone, we believe that the resulting penalty of $108,792 is "fair and just" for Catalina's seven violations of section 313 reporting requirements. Based upon our review of the penalty that would be imposed in the absence of applying the justice factor, the evidence in the record, and the serious nature of the violations, we do not find that "the circumstances are such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice." *See Spang*, 6 E.A.D. at 250. Accordingly, we reverse the Presiding Officer's decision to adjust the penalty downward $69,000 for "such other matters as justice may require."[23]

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[23]The record before us reflects that Catalina presented, and the Presiding Officer considered, three allegedly "environmentally beneficial projects" as the bases for applying the justice factor. Catalina claimed that the substitution of DBE for acetone in cleaning processes, the elimination of anti-fouling paint, and the adoption of brushable gel coat procedures were environmentally beneficial projects warranting penalty reductions under the justice factor.

Although we find that applying the justice factor here is not warranted since the penalty is fair and just in the absence of a downward adjustment for this factor, we nonetheless point out that there are real questions as to the extent to which the elimination of anti-fouling paint and the adoption of brushable gel coating even merit consideration as environmentally beneficial projects under *Spang*.

For example, with respect to the elimination of anti-fouling paint use, Mr. Douglas conceded that unspecified chemicals in the paint were below threshold levels triggering section 313 reporting requirements. The Presiding Officer, in attempting to find a nexus between Catalina's proffered project and the violations at issue, noted that, "[t]hese activities directly relate to the chemicals involved in the violations, a fact emphasized in *Spang*." Initial Decision at 37. We question this conclusion with respect to the anti-fouling bottom paint since there is no evidence in the record that the paint contained either acetone or styrene - the chemicals triggering the violations in this case.

As for the brushable gel coating activities, the record is not clear with respect to the extent and duration of Catalina's program. As we stated in *Spang*, "what is relevant is a respondent's *past* acts and expenditures." *Spang*, 6 E.A.D. at 250 (emphasis in original). Here, the costs and benefits of the project are largely speculative and described as future costs and benefits. For example, Mr. Douglas testified, "I *think* we'll look at an annual reduction in styrene emissions *over the coming year* of between 15 to 20 percent." *See* Tr. at 115 (emphasis added). *Spang* also instructs that, "if an incomplete project is sufficiently underway, such that its ability to produce environmental

III. *CONCLUSION*

For the foregoing reasons, we reverse, in part, the Initial Decision and order Catalina to pay a penalty of $108,792 by mailing or delivering a certified or cashier's check payable to the Treasurer of the United States to the following address within 60 days of the date of receipt of this order:

Regional Hearing Clerk
U.S. EPA, Region IX
Office of Regional Counsel, RC-2-1
P.O. Box 360863
Pittsburgh, PA 15251-6863

So ordered.

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benefits is not speculative, there may be sufficient ground for considering the expenditures made on a project *to that point*." *Spang*, 6 E.A.D. at 250-51 (emphasis added). Here, however, the Presiding Officer improperly considered the speculative and prospective costs and benefits of a brushable gel coating program that, at the time of the hearing, had been in place for only four months and covered only 30% of Catalina's gel coating activities. *See* Tr. at 115.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Decision in the matter of Catalina Yachts, Inc., EPCRA Appeal No. 98-2 & 98-5, were sent to the following persons in the manner indicated:

By Certified Mail
Return Receipt Requested:

Robert D. Wyatt, Esq.
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Dated: MAR 24 1999

Annette Duncan
Secretary